Supreme Court, U.S.
FILED
JUN 07 2000
CLERK

(2)

No. 99-1958

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE COMMONWEALTH OF VIRGINIA IN SUPPORT OF PETITIONER

MARK L. EARLEY
Attorney General of Virginia

*WILLIAM H. HURD
Solicitor General

SCOTT JOHN FITZGERALD
FREDERICK S. FISHER
Assistant Attorneys General

900 East Main Street
Richmond, Virginia 23219
(804) 786-2436

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

27 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTORY STATEMENT 1

INTERESTS OF *AMICI CURIAE* 2

REASONS FOR GRANTING THE WRIT 6

Summary 6

THE CIRCUIT CONFLICT IN A NUTSHELL 6

AN IMPORTANT FEDERAL QUESTION: ARE SHIPWRECKS IN COASTAL WATERS UNDER THE SAME ABANDONMENT STANDARD AS SHIPWRECKS IN THE HIGH SEAS? 11

The *Columbus-America* Rationale Makes No Sense In Coastal Waters 12

Whether There Is One Standard Or Two, Implied Abandonment Should Be The Rule For Shipwrecks In Coastal Waters 13

ANOTHER IMPORTANT FEDERAL QUESTION: DOES THE ABSENCE OF SALVAGE TECHNOLOGY ARGUE *AGAINST* ABANDONMENT, OR *FOR* IT? 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES — Page

Baltimore, Crisfield & Onancock Line v. United States, 140 F.2d 230 (4th Cir. 1944) 8

Chelentis v. Luckenbach S.S. Co., 247 U.S. 372 (1918) 6

Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 203 F.3d 291 (4th Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3757 (U.S. June 13, 2000) (No. 99-1935) 1, 10

Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), *subsequent appeal, remanded on other grounds*, 203 F.3d 291 (4th Cir. 2000) ..... *passim*

Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel, 742 F. Supp. 1327 (E.D. Va. 1990), *rev'd in part and remanded*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993) 8, 19

Commonwealth v. Maritime Underwater Surveys, Inc., 403 Mass. 501, 531 N.E.2d 549 (1988) 7

Deep Sea Research, Inc. v. The Brother Jonathan, 89 F.3d 680 (9th Cir. 1996), *aff'd in part and vacated in part on other grounds and remanded, sub nom., California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) 9, 10

Dluhos v. The Floating & Abandoned Vessel Known as the New York, 162 F.3d 63 (2d Cir. 1998) 7, 13

TABLE OF AUTHORITIES – Continued

Page

Eads v. Brazelton,
22 Ark. 499 (1861) 17

Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence,
177 F.3d 491 (6th Cir. 1999) 9

Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, 105 F.3d 1078 (6th Cir. 1997), *vacated and remanded on other grounds without op.*, 523 U.S. 1091 (1998) 10

Fitzgerald v. United States Lines,
374 U.S. 16 (1963) 11

Funk v. United States,
290 U.S. 371 (1933) 13

Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel,
758 F.2d 1511 (11th Cir. 1985) 10, 16

Knickerbocker Ice Co. v. Stewart,
253 U.S. 149 (1920) 6

The Lottawanna,
88 U.S. 558 (1875) 7

Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked & Abandoned Steam Vessel,
833 F.2d 1059 (1st Cir. 1987) 7, 16

Moyer v. The Wrecked and Abandoned Vessel, Known as The Andrea Doria,
836 F. Supp. 1099 (D.N.J. 1993) 8

Offshore Logistics, Inc. v. Tallentire,
477 U.S. 207 (1986) 6

TABLE OF AUTHORITIES – Continued

Page

Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels,
47 F. Supp. 2d 678 (E.D. Va. 1999), *appeal docketed,* No. 99-2036 (4th Cir. July 30, 1999) 3, 14

Somerset Seafood Co. v. United States,
193 F.2d 631 (4th Cir. 1951) 8

Southern Pacific Co. v. Jensen,
244 U.S. 205 (1917) 7

Southwestern Sugar & Molasses Co. v. River Terminals Corp.,
360 U.S. 411 (1959) 11

Sub-Sal, Inc. v. The DeBraak,
No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461 (D. Del. Feb. 4, 1992), *aff'd without op.,* 26 F.3d 123 (3rd Cir. 1994) 8

Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel,
569 F.2d 330 (5th Cir. 1978) 9, 10, 16

United States v. Chambers,
291 U.S. 217 (1934) 13

Wiggins v. 1100 Tons, More or Less, of Italian Marble,
186 F. Supp. 452 (E.D. Va. 1960) 8, 13

Yukon Recovery, L.L.C. v. Certain Abandoned Property,
205 F.3d 1189 (9th Cir. 2000), *petition for cert. filed,* 68 U.S.L.W. 3774 (U.S. June 20, 2000) (No. 99-1958) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATUTES AND REGULATIONS

43 U.S.C. § 1301 3

43 U.S.C. § 1312 3

43 U.S.C. § 2101 3

43 U.S.C. § 2102 13

43 U.S.C. § 2105 ..... 3, 13

43 U.S.C. § 2106 13

Va. Code § 10.1-2214 (1998) 4

Va. Code § 28.2-1204 (1997) 4

OTHER

Abandoned Shipwreck Act of 1987, H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess. 1, (1988), *reprinted in* 1988 U.S.C.C.A.N. 365 ..... 3, 15

Abandoned Shipwreck Act of 1987, H.R. Rep. No. 100-514(II), 100th Cong., 2d Sess. 1, (1988), *reprinted in* 1988 U.S.C.C.A.N. 370 3

Bruce D. Berman, Encyclopedia of American Shipwrecks (1972) 3, 4

Dava Sobel and William J.H. Andrewes, The Illustrated Longitude (1998) 18

David Swayze, *The Great Lakes Shipwreck File: Total Losses of Great Lakes Ships 1679-1998* (last modified Feb. 2000) <http://www.oakland.edu/boatnerd/swayze/shipwreck/> 4

TABLE OF AUTHORITIES – Continued

Page

Faye Mitchell Henderson, *A Blackbeard Valentine's Tale* (last modified Feb. 12, 1999) <http://web.dcr.state.nc.us/recentblackbeard.htm> 4

Maria Puente, *1802 Shipwreck In The Eye Of A Modern Legal Storm,* USA Today, May 7, 1998 at 9A 4

Mark Burwell, *Shipwrecks Off Alaska's Coast* (last modified Feb. 17, 2000) <http://www.mms.gov/alaska/ref/ships/tables/opqr.htm> 4

INTRODUCTORY STATEMENT

There are now two cases before this Court dealing with the standard of abandonment for shipwrecks. This case is one. The other is *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 203 F.3d 291 (4th Cir. 2000), *petition for cert. filed*, 68 U.S.L.W. 3757 (U.S. June 13, 2000) (No. 99-1935). A group of fifteen States and island jurisdictions* filed a brief *amici curiae* in *Columbus-America*, urging the Court to grant certiorari in *both* that case and in the case at bar. Brief *Amici Curiae* of Virginia, et al. at 19, *Columbus-America* (No. 99-1935) ("The *Columbus-America* case – especially in tandem with *Yukon Recovery* – presents this Court with an opportunity to address the issue and settle the matter. The petitions for writs of certiorari should be granted."). Not wishing to be unnecessarily duplicative, but wishing to ensure that the arguments of the *Amici* States are considered in connection with both cases, Virginia now re-submits the arguments previously made in the *Columbus-America* case.

A fundamental distinction between the two cases is that the S.S. *Islander*** – the subject of *Yukon Recovery* – sank in coastal waters, while the S.S. *Central America**** –

---

* The *Amici* States in *Columbus-America* are Virginia, Alabama, Georgia, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, North Carolina, the Northern Mariana Islands, Oregon, South Carolina, Washington and West Virginia.

** The S.S. *Islander* sank in the Gastineau Channel, an inland Alaskan waterway, in 1901 after striking an iceberg just minutes from the dock. It reportedly took with it to the bottom a large shipment of gold. Two rival salvage companies claim entitlement to the gold – one by contract right, the other by the law of salvage. Which salvor wins turns on whether the *Islander's* 1901 owners abandoned the gold.

*** The S.S. *Central America* foundered in the Atlantic 160 miles from shore during a hurricane in 1857, with the loss of

the subject of *Columbus America* – sank in the high seas. These two cases, if heard together, would present a unique opportunity for this Court to review and define the standard of abandonment for different legal landscapes. The Court would have the opportunity to determine whether shipwrecks in coastal waters are subject to the same standard of abandonment as shipwrecks in the high seas and, in any event, how the absence of contemporaneous salvage technology may figure into the analysis.

The brief that follows addresses these issues and is a repetition of the earlier brief filed in *Columbus-America*. Additional comments that may be helpful in relating the argument to *Yukon Recovery* are shown in bold italics. References to the *Amici* States refer to the same States and island jurisdictions that filed the previous brief.

INTERESTS OF *AMICI CURIAE*

The *Amici* are coastal States and island jurisdictions of the United States (collectively, "the *Amici* States").[1] As such, they exercise sovereignty over submerged lands lying adjacent to their shores.[2] Embedded in those submerged lands are the wrecks of thousands of ships, lost

---

more than 400 lives and an immense quantity of gold. The locator of the *Central America* and the insurers of the *Central America's* cargo each claim ownership of the gold. The issue turns on whether the insurers abandoned the *Central America* after its sinking in 1857.

[1] One exception is West Virginia, which joins all of her sister States of the Fourth Circuit and which has analogous interests as a riparian State bordering the Ohio River.

[2] By virtue of the 1953 Submerged Lands Act, States bordering the Atlantic Ocean or Pacific Ocean may exercise sovereignty over lands lying beneath the ocean for a distance of three miles from their shores. States bordering the Gulf of Mexico may exercise like sovereignty into the Gulf for a distance of up to three marine leagues. Great Lake States may

over the centuries.[3] By act of Congress, shipwrecks "abandoned" by their original owners now belong to the coastal States and island jurisdictions ("the States") in whose submerged lands they lie embedded. Abandoned Shipwreck Act ("ASA"), 43 U.S.C. §§ 2101 *et seq.*[4] Some of the ships are believed to have been carrying gold or other precious cargo. Others may hold artifacts of important historical value.

Included among these shipwrecks are vessels as old as the *Tiger*, a British ship sunk along the Outer Banks of North Carolina in 1585,[5] and as tragic as the *Juno*, a 34-gun Spanish frigate that foundered in 1802 with the loss of 432 sailors, soldiers and civilians[6] and believed by some to have been carrying a large shipment of precious

---

exercise such sovereignty to the boundary with Canada. 43 U.S.C. §§ 1301, 1312.

[3] Congress has estimated that 50,000 abandoned shipwrecks are located in State waters, with "5-10 percent" having historical significance. *See Abandoned Shipwreck Act of 1987*, H.R. Rep. Nos. 100-514(I) & 100-514(II), 100th Cong., 2d Sess. 1, (1988). *reprinted in* 1988 U.S.C.C.A.N. at 365, 370. *See also* Bruce D. Berman, Encyclopedia of American Shipwrecks, iii (1972) (referring to "more than 50,000 documented shipwrecks in American territorial waters," including approximately 13,000 with a gross tonnage of 50 tons or more).

[4] The *Amici* States likewise acquired title to abandoned shipwrecks embedded in their protected coralline formations, or lying on their submerged lands and included in (or eligible for inclusion in) the National Register of Historic Places. 43 U.S.C. § 2105.

[5] Bruce D. Berman, Encyclopedia of American Shipwrecks, 147 (1972).

[6] *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678, 681 (E.D. Va. 1999).

metals.[7] They include the *Queen Anne's Revenge*, flagship of the notorious pirate, Blackbeard, recently discovered in North Carolina waters;[8] the schooner *Billy Bowlegs*, a privateer lost in 1840 at the entrance to Apalachicola Bay, Florida and valued at the time at over $4 million;[9] the *Phoenix*, a three-masted, three-decked Russian frigate, the first ship built in Russian America, that sank in Alaskan waters in 1799 with the loss of the Archimandrite of the Kodiak Mission;[10] and the H.M.S. *Nancy*, a Detroit-built British warship burned and sunk by U.S. warships in Lake Huron during the War of 1812.[11]

For vessels such as these – and the thousands of other shipwrecks in coastal waters – State ownership means protection and responsible management. As the owners of shipwrecks, States are able to restrict recovery operations to those who are qualified and licensed. They are able to impose protocols that meet the exacting demands of serious underwater archeology.[12] And they

---

[7] Maria Puente, *1802 Shipwreck In The Eye Of A Modern Legal Storm*, USA Today, May 7, 1998, at 9A.

[8] Faye Mitchell Henderson, *A Blackbeard Valentine's Tale* (last modified Feb. 12, 1999)<http://web.dcr.state.nc.us/recentblackbeard.htm>.

[9] Bruce D. Berman, Encyclopedia of American Shipwrecks, 109 (1972).

[10] Mark Burwell, *Shipwrecks Off Alaska's Coast* (last modified Feb. 17, 2000) <http://www.mms.gov/alaska/ref/ships/tables/opqr.htm>.

[11] David Swayze, *The Great Lakes Shipwreck File: Total Losses of Great Lakes Ships 1679-1998* (last modified Feb. 2000) <http://www.oakland.edu/boatnerd/swayze/shipwreck/>.

[12] *See, e.g.*, Va. Code § 28.2-1204 (1997); Va. Code § 10.1-2214 (1998) ("All recovery operations . . . shall be carried out . . . in such a manner that the maximum amount of historical, scientific, archaeological and educational information may be recovered and preserved in addition to the physical recovery of items.").

are in a position to ensure that the cultural riches – and other treasures – recovered from the sea are shared with the public.

In order to have these benefits, the States must have title. But, in order for States to obtain title under the ASA, the shipwreck must be abandoned. Yet, "abandonment" is not a term with a statutory definition and there is disagreement among the circuits about what must happen in order for abandonment to occur. As discussed below, one circuit appears to recognize only *express* abandonment. Another says that abandonment may be *implied*. Still another says that implied abandonment will suffice, but has raised the bar by adding the requirement that abandonment be proved by clear and convincing evidence. These widely varying standards cause unequal treatment among the *Amici* States, and deprive some of them of rights that Congress intended to bestow on all.

These two problems – unequal treatment of the States and frustration of Congressional purpose – should be enough to merit this Court's review of the abandonment issue. But there is more. Technological developments are making possible the location and recovery of shipwrecks once thought forever lost. It may not be long before our coastal waters teem with expeditions to recover the thousands of sunken vessels and cargoes that have accumulated over time. If chaos in admiralty is to be avoided, the ownership rights of the States must be clearly established. Given the conflict among the circuits, the issue cannot be settled until this Court speaks and declares a nationwide standard for what is meant by "abandonment."

There are now two cases available to this Court to clarify the standard for abandonment: ***Columbus-America and Yukon Recovery***. The *Amici* urge the Court to grant certiorari in both.

REASONS FOR GRANTING THE WRIT

Summary

The circuits are in conflict on what is required to establish abandonment of a shipwreck. Must abandonment be express, or may it be implied? Must the proof be clear and convincing, or does a preponderance of the evidence suffice? Admiralty law should give the same answers nationwide, but now it does not. Regional answers are especially troublesome when, as here, they create disparities among the rights of States. Certiorari should be granted to resolve this conflict.

Having the same answer nationwide does not necessarily mean using the same standard in coastal waters under the ASA, as in the high seas where the ASA does not apply. Whether there is to be one standard or two is an important federal question that should be, but has not been, addressed by the Court. In any event, the purposes and expectations of the ASA can only be met if the standard for coastal waters is implied abandonment, with a presumption of abandonment arising from passage of a long period of time.

Some courts have viewed the absence of technology to salvage a ship as an argument against abandonment. But it makes more sense to view such powerlessness as an argument *for* abandonment. Since many of the wrecks that are likely to be in dispute sank long before technology became available to recover them, the significance of technological incapacity is also an important federal question that should be addressed by this Court.

THE CIRCUIT CONFLICT IN A NUTSHELL

This Court has repeatedly recognized the importance and fundamental need for "harmony" and "uniformity" of admiralty law. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920) (a "fundamental purpose" of the Constitution

is to "preserve adequate harmony and appropriate uniform rules relating to maritime matters . . . "); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917); *The Lottawanna*, 88 U.S. 558 (1875). Despite the need for harmony and uniformity, the circuits are divided on whether the abandonment of shipwrecks must be express, or whether it may be implied. They also differ as to the standard of proof and the effect of a long passage of time. Their conflicting positions may be summarized as follows:

First Circuit: Presumption of abandonment based on passage of time – *Martha's Vineyard Scuba Headquarters, Inc. v. The Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987);[13] *see also Commonwealth v. Maritime Underwater Surveys, Inc.*, 403 Mass. 501, 531 N.E.2d 549 (1988).[14]

Second Circuit: Clear and convincing evidence of express abandonment – *Dluhos v. The Floating & Abandoned Vessel Known as the New York*, 162 F.3d 63 (2d Cir. 1998).[15]

Third Circuit: No reported circuit decision. District courts have used different standards: (i) presumption of

---

[13] Law of finds (based on abandonment) appropriate where "(1) articles have been presumptively abandoned, *i.e.*, either affirmatively renounced, or so long lost that time can be presumed to have eroded any realistic claim of original title, and (2) those articles are now in hand, having been actually recovered . . . ." 833 F.2d at 1065. The *Republic* sank in 1909, seventy-six years before the First Circuit ruled.

[14] "We conclude that, since the *Whydah* has rested undisturbed and undiscovered beneath the sea for nearly three centuries, it is proper to consider the wreck abandoned and accordingly apply the law of finds." 531 N.E.2d at 552.

[15] Concerning a claim for ownership of a ship in the Erie Canal, and commenting on the preference for the law of salvage over the law of finds, the Second Circuit stated "the *New York* has neither been expressly and explicitly abandoned by its owners, nor has it rested for centuries under fathoms of open ocean." 162 F.3d at 74 [footnote omitted].

abandonment based on passage of time – *Sub-Sal, Inc. v. The DeBraak*, No. 84-296-CMW, 1992 U.S. Dist. LEXIS 2461 (D. Del. Feb. 4, 1992), *aff'd without op.*, 26 F.3d 123 (3d Cir. 1994);[16] (ii) consideration of all the circumstances – *Moyer v. The Wrecked and Abandoned Vessel, Known as The Andrea Doria*, 836 F. Supp. 1099 (D.N.J. 1993).[17]

Fourth Circuit: Clear and convincing evidence of express abandonment – *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), *subsequent appeal, remanded on other grounds*, 203 F.3d 291 (4th Cir. 2000).[18] This is the most stringent standard used by any circuit. As a result, all five states comprising the Fourth Circuit

---

[16] *Sub-Sal* was decided prior to enactment of the ASA, and concerned a British warship. "Since the *DeBraak* was abandoned in 1798 and its location off the coast of Delaware remained unknown until 1984, this Court concludes that the law of finds applies." 1992 U.S. Dist. LEXIS 2461, at *8.

[17] *Moyer* found an implied renunciation of ownership in the face of numerous independent, open and notorious salvage operations. "Abandonment may be inferred from circumstantial evidence. Factors such as lapse of time and nonuse by the owner may give rise to an inference of an intent to abandon." 836 F. Supp. at 1105 (citing *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 456 (E.D. Va. 1960). "Other factors include the place of the shipwreck as well as the actions and conduct of the parties having ownership rights in the vessel." 836 F. Supp. at 1105 (citing *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1335 (E.D. Va. 1990), *rev'd in part and remanded*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993)).

[18] "[A]bandonment must be proved by clear and convincing evidence . . . such as an owner's express declaration abandoning title." 974 F.2d at 466. *But see Baltimore, Crisfield & Onancock Line v. United States*, 140 F.2d 230 (4th Cir. 1944) and *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951), where the Fourth Circuit used an implied abandonment standard.

join*ed* in support of the petition for certiorari *filed in Columbus-America*.

Fifth Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).[19]

Sixth Circuit: Clear and convincing evidence and implied abandonment – *Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 177 F.3d 491 (6th Cir. 1999).[20]

Ninth Circuit: Implied abandonment, but a demanding evidentiary standard (insurer's failure to react to earlier salvage efforts and failure to participate in claims proceedings are insufficient to imply abandonment) – *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000);[21] consideration of all the circumstances, with implied abandonment from passage of time or failure to salvage – *Deep Sea Research, Inc. v. The Brother Jonathan*, 89 F.3d 680 (9th Cir. 1996), *aff'd in part and*

---

[19] "Disposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." 569 F.2d at 337.

[20] "We agree that lapse of time, alone, does not necessarily establish abandonment, . . . and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a combination of several facts, proved clearly and convincingly, . . . may support a finding that an owner has abandoned a shipwreck." 177 F.3d at 499-500.

[21] Apparently the District Court in *Yukon Recovery* used the preponderance of the evidence standard, which the Ninth Circuit refused to address. 205 F.3d at 1193-94. The Ninth Circuit also agreed that the competing salvor was entitled to salvage the wreck based in part on its salvage contract with the gold insurer. *Id.* at 1197. Alaska's participation in this ***amicus effort*** is precluded by the terms of its settlement in *Yukon Recovery*. Issues between the other parties remain.

vacated in part on other grounds and remanded sub nom., California v. Deep Sea Research, Inc., 523 U.S. 491 (1998).[22]

Eleventh Circuit: Presumption of abandonment based on passage of time, implied abandonment – *Klein v. The Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985).[23]

As the above list shows, the circuit courts use different tests, even as they have acknowledged frustration at the lack of uniformity.[24] This divergence is particularly

---

[22] "Although the district court in this case cites the Fourth Circuit's decision in *Columbus-America*, its holding that the *Brother Jonathan* is not abandoned rests on the traditional rule that a wreck is not abandoned unless either 1) title is affirmatively renounced, or 2) abandonment can be inferred from the lapse of time or failure to pursue salvage efforts on the part of the owners." 89 F.3d at 688.

[23] The Eleventh Circuit adopted the reasoning of the Fifth Circuit in *Treasure Salvors, Inc.*, 569 F.2d 330. *See supra* at n.19.

[24] As the Fourth Circuit noted, "[W]e agree that the [Fourth Circuit's] abandonment test was rejected by two other courts of appeal. . . . A comparison of our earlier decision in this case . . . with the decision of the Supreme Court and the Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the rule for finding abandonment is more stringent in [the Fourth Circuit] than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in *Brother Jonathan*. In any event, the rule in the three circuits is not the same and the Supreme Court has not clarified the question. . . . " *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 303-04 (4th Cir. 2000). *See also Fairport Int'l Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence*, 105 F.3d 1078, 1084-85 (6th Cir. 1997); *Deep Sea Research, Inc. v. The Brother Jonathan*, 89 F.3d 680, 688 (9th Cir. 1996).

As the Ninth Circuit observed, "The ASA creates uncertainty when a salvor cannot determine in advance whether a wreck is 'abandoned' or 'embedded' and therefore subject to the ASA and questions of fact to be decided by the court. A salvor could expend immense resources to locate,

disturbing since the rights of sovereign States are directly implicated by the standard used. It is a divergence that can only be corrected by this Court's exercise of its constitutional role to maintain uniform admiralty laws. *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963); *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 415 (1959). The petitions should be granted.

AN IMPORTANT FEDERAL QUESTION:

ARE SHIPWRECKS IN COASTAL WATERS UNDER THE SAME ABANDONMENT STANDARD AS SHIPWRECKS IN THE HIGH SEAS?

An unresolved issue in admiralty law is whether all shipwrecks are subject to the same standard of abandonment regardless of where they are found. Are shipwrecks beneath coastal waters – where the ASA applies – subject to the same standard as shipwrecks beneath the high seas?[25] The two shipwreck cases on which certiorari is now being sought – *Columbus-America* and *Yukon Recovery* – provide this Court with an opportunity to resolve this important issue of federal law.

The possibility that different standards might apply to different locations is implicit in the rationale used by the Fourth Circuit in deciding *Columbus-America*. The shipwreck in this case was found 160 miles from shore, well beyond the reach of the ASA. In determining what

---

survey and salvage a wreck only to have the court later rule that the salvor is entitled to nothing because the ASA displaces the law of salvage. Both of the parties to this litigation have expended significant resources to locate the *Islander* but prudently avoided costly salvage operations which could have resulted in a total loss under the ASA." *Yukon Recovery*, 205 F.3d at 1196.

[25] For purposes of this Brief, the term "high seas" shall mean waters and submerged lands sufficiently distant from the shore as not to be covered by the ASA.

law to apply to the case, the Fourth Circuit was faced with two options – finds law and salvage law – with the choice between them depending on whether or not the vessel was abandoned. If the vessel *was* abandoned, then no one had title to it and the law of finds applied. If it was *not* abandoned, title remained with the original owner and the law of salvage applied. Before deciding what abandonment standard to use, the Fourth Circuit expressed a policy of favoring salvage law over finds law. The Court said:

> In sharp contrast to "the harsh, primitive, and inflexible nature of the laws of finds" is the law of salvage. *Admiralty favors the law of salvage over the law of finds because salvage law's aims, assumptions, and rules are more consonant with the needs of marine activity and because salvage law encourages less competitive and secretive forms of conduct than finds law.*

Columbus-America, 974 F.2d at 460 (emphasis added).

The Fourth Circuit then set the abandonment standard high in order to give a broad sweep to the favored law of salvage and a narrow sweep to the disfavored law of finds.

The *Columbus-America* Rationale Makes No Sense In Coastal Waters.

A major problem with the rationale used in *Columbus-America* is that it makes no sense to apply it to shipwrecks in coastal waters governed by the ASA. There the choice of law is different. In coastal waters, there is no law of finds. Instead, there is the law of salvage and the law of State ownership, with the choice between them again depending on whether or not the vessel was abandoned. If the vessel was *not* abandoned, title to it remains with the original owner and the law of salvage applies. If it *was* abandoned, title is vested in the State under the ASA. Since title must be vested in either the original owner or the State, the precondition on which the law of

finds is based – *i.e.*, that no one has title – never arises. *Dluhos*, 162 F.3d at 74, n.10; *Wiggins*, 186 F. Supp. at 456. *See also* 43 U.S.C. § 2106 ("The law of salvage and the law of finds shall not apply to abandoned shipwrecks to which § 6 of [the ASA] [43 U.S.C. § 2105] applies.").[26] Thus, in coastal waters, the rationale that animated the Fourth Circuit – a preference for the law of salvage over the law of finds – is irrelevant. "Where the reason of the rule ceases, the rule also ceases." *Funk v. United States*, 290 U.S. 371, 385 (1933); *United States v. Chambers*, 291 U.S. 217, 226 (1934). ***Thus the express abandonment standard created by the Fourth Circuit makes no sense when applied to wrecks such as the Islander.***

Whether There Is One Standard Or Two, Implied Abandonment Should Be The Rule For Shipwrecks In Coastal Waters.

If the policy-driven methodology used in *Columbus-America* is transported from the high seas into coastal waters, the different choice of law leads to an abandonment standard directly opposite to the one reached by the

---

[26] There is one hypothetical exception to the proposition that the law of finds has no application in areas governed by the ASA. Under that statute, in order for a State to become the owner, the shipwreck must be both "abandoned" and "embedded" in the State's submerged lands. Theoretically, a shipwreck could be abandoned but not yet embedded. In such a case, the law of finds would apply to the abandoned wreck until it became embedded. As a practical matter, however, it is not likely that any ship of any value would be so readily abandoned, especially since "embeddedness" is a criterion that is met soon after the ship sinks to the bottom. "For purposes of this Act . . . the term 'embedded' means firmly affixed in the submerged lands or in corralline formations such that the use of tools of excavation is required in order to move the bottom sediments to gain access to the shipwreck, its cargo, *and any part thereof*." 43 U.S.C. § 2102 (emphasis added).

Fourth Circuit.[27] If finds law is disfavored compared to salvage law, then salvage law must likewise be disfavored compared to State ownership under the ASA. This preference for State ownership must be recognized for at least three reasons: First, to paraphrase *Columbus-America*, State ownership's "aims, assumptions and rules are more consonant with the needs of marine activity [than salvage law] and . . . [State ownership] encourages less competitive and secretive forms of conduct than [salvage law]." *See* 974 F.2d at 460. Second, State ownership is the result of congressional deliberation and enactment of the ASA, and thus represents a conscious policy choice made by the legislative branch. If Congress thought that salvage law was good enough for coastal waters, it would have said so. Third, State ownership is better designed than the law of salvage to protect the public interest in the historic value – and potential financial value – of shipwrecks in coastal waters.

In *Columbus-America*, the Fourth Circuit set the abandonment standard high in order to give broad sweep to salvage law, which it favored in the high seas context of that case. By analogy, then, when the shipwreck is in coastal waters, the abandonment standard must be set low in order to give broad sweep to State ownership, which is the favored law in that context. This means using a standard of implied abandonment for shipwrecks in coastal waters.

Since the policy-driven methodology used in *Columbus-America* logically leads to different standards in

---

[27] This is not to say, however, that the Fourth Circuit will necessarily agree with this argument. Indeed, at least one district court in the Fourth Circuit views *Columbus-America* as requiring an express abandonment standard even for shipwrecks in coastal waters. *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels*, 47 F. Supp. 2d 678 (E.D. Va. 1999) (applying express abandonment standard to Spanish ships sunk in 1750 and 1802), *appeal docketed*, No. 99-2036 (4th Cir. July 30, 1999).

different contexts, the next question is whether that lack of uniformity is appropriate. And, assuming *arguendo* that there should be a single standard for both contexts, how should that standard be determined? One approach would be to continue the focus on policy considerations, but to ask which context – high seas or coastal waters – should drive the definition of that single standard. Is it more important to have (i) a broad application of State ownership in coastal waters, or (ii) a broad application of salvage law in high seas?

The *Amici* States contend that a broad application of State ownership is more important. This is so for at least three reasons. First, shipwrecks are more concentrated in coastal waters and are more likely to be recovered than shipwrecks in the high seas. Thus, the rule best suited for coastal waters should govern. Second, the public interest in shipwrecks located in coastal waters should outweigh the purely private interests of parties battling over shipwrecks in the high seas. Third, the legislative history of the ASA, on which State ownership is based, shows that Congress understood the rule to be abandonment by implication.

> [T]he term abandoned does not require the original owner to actively disclaim title or ownership. *The abandonment or relinquishment of ownership may be implied or otherwise inferred,* as by an owner never asserting any control over or otherwise indicating his claim of possession of the shipwreck.

H.R. Rep. No. 100-514(I), 100th Cong., 2d Sess. 1, (1988) at 2, *reprinted in* 1988 U.S.C.C.A.N. at 366 (emphasis added). The standard should be designed to accomplish – rather than frustrate – these Congressional expectations and give broad sweep to its enactment. Again, this means abandonment by implication.

Another approach to defining a single standard would be to disregard the competing policy considerations and to look to other principles instead. But to

disregard those policy considerations is to remove the very foundation on which the Fourth Circuit built its stringent standard in *Columbus-America*. What is left is the competing rationale used by Judge Widener in his *Columbus-America* dissent – and by courts in conflict with the Fourth Circuit – in recognizing a more generous abandonment standard. That standard includes recognition of abandonment implied by the long passage of time. "[D]isposition of a wrecked vessel whose very location has been lost for centuries as though its owner were still in existence stretches a fiction to absurd lengths." *Columbus-America*, 974 F.2d 450, 477 (Widener, J., dissenting), *quoting Treasure Salvors, Inc.*, 569 F.2d at 337 (Spanish galleon sunk in 1622); *also citing Martha's Vineyard*, 833 F.2d at 1065 (ocean liner sunk in 1909); *Klein*, 758 F.2d at 1514 (English ship sunk in eighteenth century).

In short, if there is to be a *single* standard for the high seas and coastal waters, then it must be implied abandonment, not express abandonment. On the other hand, if there are to be *separate* standards for coastal waters and the high seas, then the standard for coastal waters still must be implied abandonment. The *Amici* States urge the Court to grant certiorari in *Columbus-America* and *Yukon Recovery* in order to make it clear that whether there is to be one standard or two, the only standard applying to coastal waters is implied abandonment. ***The petitions should be granted to remove any doubt as to the standard of abandonment for coastal waters such as where the Islander rests.***

ANOTHER IMPORTANT FEDERAL QUESTION:

DOES THE ABSENCE OF SALVAGE TECHNOLOGY ARGUE *AGAINST* ABANDONMENT, OR *FOR* IT?

The decisions in *Columbus-America* and *Yukon Recovery* are based in part on the view that technological inability to find or salvage a shipwreck argues *against*

abandonment. *Columbus-America*, 974 F.2d at 463 (insurance carrier "not required to engage in efforts to recover the wreck in order to avoid abandoning its interest when such efforts would have had minimal chances for success") (citation omitted); *Yukon Recovery*, 205 F.3d at 1194 (failure to use "primitive, although ingenious, technology" that previously proved unsuccessful does not constitute abandonment). But, this has gotten things backwards, at least insofar as older shipwrecks are concerned. If the generation in which a vessel sank had no means to find or salvage it, a court should infer, in the absence of other evidence, that the owners of that vessel, having no hope of remedying their loss, simply abandoned it.[28]

The *Columbus-America* decision implicitly attributes to generations past a faith in technological progress that is a phenomenon of the late 20th century. ***The Yukon Recovery decision makes the same error.*** When confronted by a problem that current technology cannot solve, society today tends to believe it is only a matter of time before a solution will be found. It is an attitude that springs from witnessing the marvels of space travel, heart transplants, nuclear energy, computers, the Internet and all the other increases in technology over the past one or two generations. But for most of human history, the pace of progress has been very slow. The wooden ships that sailed the ocean two hundred years ago still had no means of power other than the wind, no means to light their craft other than oil lamps, and had been equipped only recently with a reliable means of finding their

---

[28] *See generally, Eads v. Brazelton*, 22 Ark. 499 (1861) (rejecting claim by attempted salvor whose inability to recover shipment of lead was the result of the lack of steam power and other technology used by later, successful salvor).

longitude at sea.[29] By the time the *Central America* sank in 1857, steam power had been introduced as a supplemental source of power, often linked to paddlewheels. But ships were still made of wood and they were all designed to float on top of the sea, not sail beneath it. Electric power was still a generation or more away. Plumbing the bottom of the ocean was no more possible for man than flying to the moon. ***In the same vein, it took thirty-three years for someone to develop "primitive, although ingenious" technology to reach the Islander. Yet despite the innovative salvage attempt in 1934, which failed to recover the gold, neither the 1934 salvor nor the gold's insurer tried again.***

Nearly a century and a half later, those who found the wreck of the *Central America* and recovered her cargo were able to do so only by the use of science that not even Jules Vernes predicted: computer-guided, satellite-based, geo-positioning technology and robotic submarines, outfitted with video cameras, that could withstand the crushing pressures and extreme cold a mile and a half below the surface. To suggest that the owners of long lost shipwrecks not only foresaw the ability to recover them – but based their decisions on such prophecies – is fantasy. If the technology of the era did not permit recovery of a sunken vessel, the owners did not decide to wait a century or two until all these things could be invented. They did what any reasonable person of the era would have done: they abandoned it.[30] ***Similarly, those who seek to***

---

[29] The means to accurately calculate one's longitude did not become available until the 1780's. *See* Dava Sobel and William J.H. Andrewes, The Illustrated Longitude (1998).

[30] "They [the insurance companies] had no hope or idea they could locate the *Central America*, and even if they located it, they had no hope they could recover anything from it. . . . Such action was guided by the decision that location of the wreck was next to impossible; but, even if located, recovering it was

recover the Islander's gold must rely on technology undreamed of one hundred years ago. The inability to salvage the Islander's gold until now tends to prove abandonment, particularly when the purported owner acquiesced in previous salvage attempts. Tellingly, although modern technology has found the Islander, neither party in Yukon Recovery has attempted salvage because of the legal uncertainties caused by the lack of a uniform test for abandonment. See supra at n.24. This Court should grant the petitions for the additional purpose of making clear that the absence of contemporaneous technology to recover an older wreck tends to *prove* abandonment, not disprove it.

CONCLUSION

A conflict among the circuits on an important legal issue can always be problematic, but it is especially troublesome when it occurs in admiralty law, where uniformity has always been greatly valued. It is even more urgent when the conflict causes some States of the Union to be denied important benefits that other States are granted. Such a troublesome and urgent conflict has arisen on the issue of abandonment. It should be resolved as soon as possible, and resolved in a manner that gives all States the full benefit of the implied abandonment standard contemplated by Congress when it passed the

---

beyond the ability of any known means. Not only was this true in 1857, and five years thereafter, but continued to be true for some one hundred years thereafter. But even after scientific means of locating ship wrecks and possible recovery in deep water became known some twenty or more years prior to the actions of the plaintiff in this case, still not one of the insurance companies undertook to locate or recover the *Central America.*" *Columbus-America Discovery Group, Inc. v. The Unidentified, Wrecked & Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1345 (E.D. Va. 1990).

Abandoned Shipwreck Act. The *Columbus-America* case – especially in tandem with *Yukon Recovery* – presents this Court with an opportunity to address the issue and settle the matter. The petitions for writs of certiorari should be granted.

July 7, 2000

Respectfully submitted,

Commonwealth of Virginia

MARK L. EARLEY
Attorney General of Virginia

*WILLIAM H. HURD
Solicitor General

SCOTT JOHN FITZGERALD
FREDERICK S. FISHER
Assistant Attorneys General
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436

**Counsel of Record*